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EPA REGION VIII
MINING BUREAU

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:
Libby Asbestos Site, OU 3
Libby Montana

W.R. Grace & Co. – Conn. and
Kootenai Development Corporation,

Respondents

ADMINISTRATIVE SETTLEMENT
AGREEMENT AND ORDER ON
CONSENT FOR REMOVAL ACTION

U.S. EPA Region 8
CERCLA Docket No. CERCLA-08-2012-0004

Proceeding Under Sections 104, 106(a), 107
and 122 of the Comprehensive
Environmental Response, Compensation,
and Liability Act, 42 U.S.C. §§ 9604,
9606(a), 9607 and 9622

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (Settlement Agreement) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and W.R. Grace & Co. – Conn. and Kootenai Development Company (Respondents). This Settlement Agreement provides for the performance of a removal action by Respondents and the payment of certain response costs incurred by the United States at or in connection with the Libby Asbestos Site (Site), Operable Unit 3 (OU 3), generally located at Libby, Lincoln County, Montana.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622 (CERCLA).

3. EPA has notified the State of Montana of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondents recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Respondents agree to comply with and be bound by the terms of this Settlement Agreement and further agree that they will not contest the basis or validity of this Settlement Agreement or its terms.

II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Settlement Agreement.

6. Respondents are jointly and severally liable for carrying out all activities required by this Settlement Agreement. In the event of the insolvency or other failure of any Respondent to implement the requirements of this Settlement Agreement, the remaining Respondent shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondents shall be responsible for any noncompliance with this Settlement Agreement.

III. DEFINITIONS

8. Unless otherwise expressly provided in this Settlement Agreement, terms used in this Settlement Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Action Memorandum Amendment” shall mean the EPA Action Memorandum Amendment relating to OU3 of the Site signed on August 31, 2012, and all attachments thereto. The Action Memorandum Amendment is attached as Appendix A.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Day” shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

“Effective Date” shall mean the effective date of this Settlement Agreement as provided in Section XXXII.

“EPA” shall mean the U.S. Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports, and other deliverables pursuant to this Settlement Agreement, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 59 (including, but not limited to, costs and attorneys fees and any monies paid to secure access, including, but not limited to, the amount of just compensation), and Paragraph 69 (emergency response). Future Response Costs shall also include Agency for Toxic Substances and Disease Registry (ATSDR) costs regarding the Site.

“Grace” shall mean W.R. Grace & Co. – Conn. (known as W.R. Grace & Co. from 1963 to 1988), a Respondent under this Settlement Agreement.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest

shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“KDC” shall mean Kootenai Development Company.

“MDEQ” shall mean the Montana Department of Environmental Quality and any successor departments or agencies of the State.

“Mine” shall mean the Zonolite Vermiculite Mine located near Libby, Montana.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“OU 3” shall mean operable unit 3 of the Site which includes property in and around the Zonolite Vermiculite Mine owned by Grace or Grace-owned subsidiaries (excluding OU2) and any area (including any structure, soil, air, water, sediment or receptor) impacted by the release and subsequent migration of hazardous substances and/or pollutants or contaminants from such property, including, but not limited to, the mine property, the Kootenai River and sediments therein, Rainy Creek, Rainy Creek Road and areas in which tree bark is contaminated with such hazardous substances and/or pollutants and contaminants.

“Paragraph” shall mean a portion of this Settlement Agreement identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean EPA and Respondents.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Respondents” shall mean W.R. Grace & Co.- Conn., and Kootenai Development Company.

“Section” shall mean a portion of this Settlement Agreement identified by a Roman numeral.

“Settlement Agreement” shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXXI). In the event of conflict between this Administrative Settlement Agreement and Order on Consent and any appendix, this Administrative Settlement Agreement and Order on Consent shall control.

“Site” shall mean the Libby Asbestos Superfund Site located in and around Libby, Montana, including those areas in which vermiculite was handled, processed or on which amphibole asbestos otherwise came to be located.

“Libby Asbestos Site Special Account - OU 3” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

“State” shall mean the State of Montana.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

“Waste Material” shall mean (a) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (b) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (c) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

“Work” shall mean all activities Respondents are required to perform under this Settlement Agreement except those required by Section XII (Record Retention).

“Work Plan” shall mean the work plan for the implementation of the Action Memorandum Amendment attached hereto as Appendix B.

IV. FINDINGS OF FACT

9. In the late 1800s, gold miners discovered a significant body of vermiculite ore in an area located in the mountains about seven miles northeast of the town of Libby, Montana.

10. From 1963 to 1990 Grace mined and beneficiated (through milling) vermiculite ore at the Mine, separating some non-vermiculite materials from the vermiculite ore. The beneficiated vermiculite ore was known as vermiculite concentrate.

11. One of the minerals found in the vermiculite deposits near Libby is tremolite, which is a form of asbestos in the amphibole family. There is also non-asbestiform tremolite in the Libby vermiculite deposit.

12. Libby vermiculite ore deposits contain measurable quantities of amphibole asbestos.

13. While much of the asbestos in the Libby vermiculite deposit was removed from the vermiculite in the mining, milling and screening process, the vermiculite concentrate (processed but unexpanded vermiculite) that was transported to expanding plants had an asbestos content of up to 5%.

14. From 1963 until 1990, Grace operated a screening plant, a processing plant at which vermiculite concentrate was separated into different grades through a mechanical screening process.

15. Prior to the mid-1970s, a screening plant was located at the Mine.

16. After the mid-1970s, the screening plant was located down Rainy Creek Road from the Mine, at the intersection of Highway 37 and Rainy Creek Road on the bank of the Kootenai River, about four miles from Libby, partially located on the Flyway.

17. Prior to the construction of the new screening plant at that location, the property at the intersection of Highway 37 and Rainy Creek Road was used as a holding point for vermiculite concentrate trucked from the screening plant at the Mine.

18. From 1963 to 1990, Grace transported, screened, and sized vermiculite concentrate from the property at the intersection of Highway 37 and Rainy Creek Road across the Kootenai River by conveyer belt to a rail loading station where it was placed in bulk in rail hopper cars for distribution to customers and processing facilities in other states.

19. In the operation of the screening plant, there were occasionally spills, processing errors, or lack of demand for certain size grades of vermiculite concentrate.

20. At various times between 1963 and 1990, the vermiculite concentrate that had spilled, vermiculite concentrate that was affected by processing errors, or vermiculite concentrate of a grade for which there was no immediate demand was placed in various outdoor locations on the grounds of the screening plants where it was open to the environment.

21. In 1990, Grace ceased vermiculite mining and processing operations in Libby.

22. In the mid-1990s, Grace sold several of the properties associated with its former vermiculite operations in and near Libby.

23. In 1994 Grace sold portions of OU3 to KDC including the Mine.

24. KDC was aware of the presence of asbestos at the Mine at the time it purchased that property in the mid-1990s.

25. In 2000 Grace purchased a controlling interest in KDC.

26. On April 2, 2001, Respondents each commenced voluntary chapter 11 Bankruptcy cases in the United States Bankruptcy Court for the District of Delaware entitled W. R. Grace & Co., et al, jointly administered under Case No. 01-01139 and have been operating their businesses as debtors in possession under chapter 11 of the Bankruptcy Code since that time.

27. EPA's investigations have shown that human activities which disturb soils contaminated with amphibole asbestos may result in exposures to airborne fibers. Thus, people who have been, or may be in the future, involved in certain activities within OU 3 may be exposed to airborne fibers.

28. The State requested EPA to list the Libby Asbestos Site on the National Priorities List as the State's top priority site pursuant to 42 U.S.C. § 9605(a)(8)(B) and 40 C.F.R. § 300.425(c)(2). See 67 Fed. Reg. 8836, 8839 (Feb. 26, 2002).

29. On October 24, 2002 EPA listed the Libby Asbestos Site on the National Priorities List. See 67 Fed. Reg. 65,315 (Oct. 24, 2002).

30. Test results indicated elevated levels of asbestos contamination at the Site. See Action Memoranda 5-23-00 and 8-17-01.

31. Pursuant to an Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study (CERCLA-08-2007-0012). Respondents have been performing a remedial investigation at OU 3.

32. Levels of asbestos fibers that may periodically exceed federal drinking water maximum contaminant levels and Montana water quality standards have been observed in surface water at OU 3.

33. Asbestos-containing waste vermiculite has been found at OU 3 in an area that is actively eroded by surface water which may result in the release of asbestos fibers into the Rainy Creek watershed.

34. Samples of the waste vermiculite show concentrations of 3 to 4% Libby amphibole asbestos.

35. The levels of asbestos detected in the waste vermiculite and in surface water at OU 3, if not addressed by implementation of the Work pursuant to this Settlement Agreement, may pose an imminent and substantial threat to receptors at the Site.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

36. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. OU3 of the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at OU3, as identified in the Findings of Fact above, includes a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response actions and for response costs incurred and to be incurred at OU3. KDC is the "owner" and/or "operator" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). Grace was the "owner" and/or "operator" of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement Agreement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. SETTLEMENT AGREEMENT AND ORDER

37. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

38. Respondents shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within ten (10) days after the Effective Date. Respondents shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least five (5) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within five (5) days after EPA's disapproval. Respondents' proposed contractor must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by EPA.

39. Within ten (10) days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within 5 days following EPA's disapproval. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by all Respondents.

40. EPA has designated Christina Progross as its Project Manager for OU 3 of the Site. Except as otherwise provided in this Settlement Agreement, Respondents shall direct all submissions required by this Settlement Agreement to the EPA Project Manager at U.S. EPA Region 8, EPR-SR, 1595 Wynkoop Street, Denver, 80202.

41. EPA and Respondents shall have the right, subject to Paragraph 39, to change their respective designated Project Manager or Project Coordinator. Respondents shall notify EPA five (5) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

42. Respondents shall perform all actions necessary to implement the Action Memorandum Amendment. Respondents shall conduct the Work in accordance with the provisions of this Settlement Agreement, the Work Plan attached hereto as Appendix B, CERCLA, the NCP, and EPA guidance.

43. Work Plan Implementation.

a. Within twenty-five (25) days after the Effective Date, Respondents shall in accordance with the Work Plan submit to EPA for approval a Sampling and Analysis Plan/ Quality Assurance Project Plan (SAP/QAPP), similar in scope and detail to previous OU 3 SAP/QAPPs, which includes, but is not limited to, the following components: goals of the work to be performed, a list of key personnel and responsibilities, Data Quality Objectives (DQOs), a Field Sampling Plan (FSP), a data management plan, a schedule, and will include all elements of a Quality Assurance Project Plan (QAPP). The FSP portion of the SAP/QAPP will describe the sampling program including the rationale, number, type, and location of samples; the sample collection, handling and custody procedures; the required field documentation and the required analytical methods. The SAP/QAPP will describe the measures necessary to generate data of sufficient quality to achieve the DQOs. The SAP/QAPP will also contain details of any special training requirements and certifications, quality control requirements for field activities and analytical processes, and data validation requirements. The SAP/QAPP must comply with requirements set forth in "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001, Reissued May 2006), and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/240/R-02/009, December 2002), and the EPA Region 8 QA Document Review Crosswalk (Appendix C).

b. EPA may approve, disapprove, require revisions to, or modify the draft SAP/QAPP in whole or in part. If EPA requires revisions, Respondents shall submit a revised SAP/QAPP within ten (10) days after receipt of EPA's notification of the required revisions.

c. Respondents shall implement the Work Plan and SAP/QAPP as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement Agreement.

d. Respondents shall not commence any Work except in conformance with the terms of this Settlement Agreement. Respondents shall not commence implementation of the Work Plan until receiving written EPA approval pursuant to Paragraph 43(b).

44. Health and Safety Plan. Within ten (10) days after the Effective Date, Respondents shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-site work under this Settlement Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration (OSHA) regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondents shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

45. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Settlement Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control (QA/QC), data validation, and chain of custody procedures. Respondents shall either submit samples to EPA for analysis, or ensure that the laboratory used to perform the analyses has met the requirements set forth in Appendix D, and has been accepted by EPA prior to analysis of any OU 3 samples. In brief, approved laboratories must show proficiency in Libby-specific analytical methods, must participate in the EPA QA program at the site (audits, mentoring, lab calls, etc.), and must be able to meet analytical turnaround requirements and electronic data deliverable requirements. Respondents shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondents shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001; Reissued May 2006)," or equivalent documentation as determined by EPA.

b. Upon request by EPA, Respondents shall have an approved laboratory analyze samples submitted by EPA for QA monitoring. Respondents shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Respondents shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondents shall notify EPA not less than 10 days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondents to take split or duplicate samples of any samples it takes as part of its oversight of Respondents' implementation of the Work.

46. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by EPA, Respondents shall submit a proposal for post-removal site control consistent with Section 300.415(l) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA

approval, Respondents shall implement such controls and shall provide EPA with documentation of all post-removal site control arrangements.

47. Reporting.

a. Respondents shall submit a progress report via email to EPA concerning actions undertaken pursuant to this Settlement Agreement weekly after the date of receipt of EPA's approval of the SAP/QAPP until termination of this Settlement Agreement, unless otherwise directed in writing by the EPA Project Manager. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondents shall submit three hard (3) copies and one (1) electronic copy of all plans, reports or other submissions required by this Settlement Agreement or any approved work plan, with the exception of weekly progress reports which will be submitted to EPA electronically.

c. Respondents who own or control property at the Site shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Settlement Agreement and written notice to EPA and the State of the proposed conveyance, including the name and address of the transferee. Respondents who own or control property at the Site also agree to require that their successors comply with the immediately preceding sentence and Sections X (Site Access) and XI (Access to Information).

48. Final Report. Within forty-five (45) days after completion of all Work required by this Settlement Agreement, Respondents shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Settlement Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement Agreement, a discussion of problems encountered and their resolution, a listing of quantities and types of materials removed off-Site or handled on-site, quantities of fill material used to restore the grade in the excavated area if applicable, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include a map showing actual dimensions of the excavated areas as well as actual locations of the disposal of the material. This map shall show the locations and sample IDs of confirmation samples taken and location of creek channel and the location of temporary haul roads, if applicable. The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true,

accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

49. Off-Site Shipments.

a. Respondents shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility’s state and to the EPA Project Manager. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(1) Respondents shall include in the written notification the following information: (i) the name and location of the facility to which the Waste Material is to be shipped; (ii) the type and quantity of the Waste Material to be shipped; (iii) the expected schedule for the shipment of the Waste Material; and (iv) the method of transportation. Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of the receiving facility and state will be determined by Respondents following the award of the contract for the removal action. Respondents shall provide the information required by Paragraph 49.a and 49.b as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Respondents shall obtain EPA’s certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

50. After review of any plan, report or other item that is required to be submitted for approval pursuant to this Settlement Agreement, in a notice to Respondents, EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within thirty ten (10) days, except where doing so would cause serious disruption to the Work, would delay an emergency response, or where previous submission(s) have been disapproved due to material defects.

51. In the event of approval, approval upon conditions, or modification by EPA, pursuant to subparagraph 50 (a), (b), (c) or (e), Respondents shall proceed to take any action

required by the plan, report or other deliverable, as approved or modified by EPA subject only to its right to invoke the dispute resolution procedures set forth in Section XVII (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to subparagraph 50(c) and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XIX (Stipulated Penalties).

52. Resubmission.

a. Upon receipt of a notice of disapproval, Respondents shall, within ten (10) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XIX, shall accrue during the ten (10) day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 50 and 51.

b. Notwithstanding the receipt of a notice of disapproval, Respondents shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by EPA. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XIX (Stipulated Penalties).

53. If EPA disapproves a resubmitted plan, report or other deliverable, or portion thereof, EPA may again direct Respondents to correct the deficiencies. EPA shall also retain the right to modify or develop the plan, report or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified or developed by EPA, subject only to Respondents' right to invoke the procedures set forth in Section XVII (Dispute Resolution).

54. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately unless Respondents invoke the dispute resolution procedures in accordance with Section XVII (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a dispute resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XVII (Dispute Resolution) and Section XIX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during dispute resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified or superseded as a result of a decision or agreement reached pursuant to the dispute resolution process set forth in Section XVII, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XIX.

55. In the event that EPA takes over some of the Work, Respondents shall incorporate and integrate information supplied by EPA into the final report.

56. All plans, reports, and other deliverables submitted to EPA under this Settlement Agreement shall, upon approval or modification by EPA, be incorporated into and enforceable under this Settlement Agreement. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this Settlement Agreement, the approved or modified portion shall be incorporated into and enforceable under this Settlement Agreement.

57. Neither failure of EPA to expressly approve or disapprove of Respondents' submission within a specified time period, nor the absence of comments, shall be construed as approval by EPA. Regardless of whether EPA gives express approval for Respondents' deliverables, Respondents are responsible for preparing deliverables acceptable to EPA.

X. SITE ACCESS

58. If the Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by any of the Respondents, such Respondents shall, commencing on the Effective Date, provide EPA, the State, and their representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Settlement Agreement.

59. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within twenty (20) days after the Effective Date, or as otherwise specified in writing by the EPA Project Manager. Respondents shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described in this Settlement Agreement, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XVI (Payment of Response Costs).

60. Notwithstanding any provision of this Settlement Agreement, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XI. ACCESS TO INFORMATION

61. Respondents shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

62. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and the State under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

63. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA and the State with the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of the author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the contents of the document, record, or information; and (f) the privilege asserted by Respondents. However, no documents, reports, or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged or confidential.

64. No claim of privilege or confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XII. RECORD RETENTION

65. Until ten (10) years after Respondents' receipt of EPA's notification pursuant to Section XXX (Notice of Completion of Work), each Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXX (Notice of Completion of Work), Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature, or description relating to performance of the Work.

66. At the conclusion of this document retention period, Respondents shall notify EPA and the State at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by EPA or the State, Respondents shall deliver any such records or documents to EPA or the State. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA or the State with the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information;

(c) the name and title of the author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged or confidential.

67. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its potential liability regarding the Site since the earlier of notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA and State requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XIII. COMPLIANCE WITH OTHER LAWS

68. Respondents shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable state and federal laws and regulations, except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-site actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental or state environmental or facility siting laws. Respondents shall identify ARARs in the Work Plan subject to EPA approval.

XIV. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

69. In the event of any action or occurrence during performance of the Work that causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate, or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the Project Manager and the Environmental Response Specialist (ERS) in Libby (406-291-5335) of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payment of Response Costs).

70. In addition, in the event of any release of a hazardous substance from the Site, Respondents shall immediately notify the EPA Project Manager and the ERS. Respondents shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting

requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XV. AUTHORITY OF EPA PROJECT MANAGER

71. The EPA Project Manager shall be responsible for overseeing Respondents' implementation of this Settlement Agreement. The EPA Project Manager shall have the authority vested in an On Scene Coordinator by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the Site. Absence of the EPA Project Manager from the Site shall not be cause for stoppage of work unless specifically directed by the EPA Project Manager.

XVI. PAYMENT OF RESPONSE COSTS

72. Payments for Future Response Costs.

a. Respondents shall pay EPA all Future Response Costs not inconsistent with the NCP. Future Response Costs incurred pursuant to this Settlement Agreement shall be billed pursuant to, and paid with other response costs incurred at OU 3 as allowed by, Section XVIII of the Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study, Docket Number CERCLA-08-2007-0012, dated September 17, 2007 (the "RI/FS AOC") and as discussed in this Paragraph. In the event of a conflict between this Section and Section XVIII of the RI/FS AOC, this Paragraph shall control. On a periodic basis, EPA will send Respondents a bill requiring payment that includes a standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA, its contractors, and DOJ. Respondents shall make all payments within thirty (30) days after receipt of each bill requiring payment, except as otherwise provided in Paragraph 74 of this Settlement Agreement.

b. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks or by wire transfer(s) made payable to "EPA Hazardous Substance Superfund" and shall include their name and address and the EPA Site/Spill ID number 08BC(OU3). Respondents shall send the payment(s) as indicated below:

For certified or cashier's checks, payment must be received by 11:00 AM Eastern Time for same day credit and should be forwarded to the following address:

Mail:

U. S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63101

For wire transfers, payment must be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045

Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

ACH (also known as REX or remittance express)

U.S. Treasury REX/Cashlink ACH Receiver
ABA- 051036706
Account Number 310006
Environmental Protection Agency
CTX Format Transaction Code 22 – checking
Physical Location:
5700 Rivertech Court
Riverdale, MO 20737

c. At the time of payment, Respondents shall send notice that payment has been made to:

Dana Sherrer
U. S. EPA
26 Martin Luther King Drive
Cincinnati, Ohio 45268

Attention: FINANCE
MS: NWD

E-mail (to both): sherrer.dana@epa.gov and AcctsReceivable.CINWD@epa.gov

and

Cost Recovery Program Manager, ENF-RC
Superfund Enforcement Program
U. S. EPA, Region 8
1595 Wynkoop
Denver, CO 80202-1129

d. The total amount to be paid by Respondents pursuant to Paragraph 72 shall be deposited in the Libby Asbestos Site – OU 3 Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with OU 3 of the Site, or to be transferred by EPA to a sitewide special account or the EPA Hazardous Substance Superfund.

73. If Respondents do not pay Future Response Costs within thirty (30) days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance of Future Response Costs. The Interest on unpaid Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XIX. Respondents shall make all payments required by this Paragraph in the manner described in Paragraph 72.

74. Respondents may contest payment of any Future Response Costs billed under Paragraph 72 if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. Such objection shall be made in writing within thirty (30) days after receipt of the bill and must be sent to the EPA Project Manager. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall within the thirty (30)-day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 72. Simultaneously, Respondents shall establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation ("FDIC"), and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the EPA Project Manager a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XVII (Dispute Resolution). If EPA prevails in the dispute, within five (5) days after the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 72. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 72. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse EPA for its Future Response Costs.

XVII. DISPUTE RESOLUTION

75. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

76. If Respondents object to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within five (5) days after such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have twenty (20) days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

77. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Assistant Regional Administrator level or higher will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondents' obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs, and regardless of whether Respondents agree with the decision.

XVIII. FORCE MAJEURE

78. Respondents agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance, or a failure to attain performance standards set forth in the Action Memorandum Amendment.

79. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within two (2) days of when Respondents first knew that the event might cause a delay. Within three (3) days thereafter, Respondents shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents'

rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

80. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XIX. STIPULATED PENALTIES

81. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 82 and 83 for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVIII (*Force Majeure*). "Compliance" by Respondents shall include completion of the activities under this Settlement Agreement or any work plan or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

82. Stipulated Penalty Amounts - Work (Including Payments).

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with this Settlement Agreement or failure to pay costs:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$2,500	15th through 30th day
\$37,500	31st day and beyond

82. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$100	1st through 14th day
\$500	15th through 30th day
\$5,000	31st day and beyond

84. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 94 (Work Takeover), Respondents shall be liable for a stipulated penalty in the amount of \$100,000.

85. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and (b) with respect to a decision by the EPA Management Official designated in Paragraph 77 of Section XVII (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing in this Settlement Agreement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

86. Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement Agreement, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

87. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days after Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVII (Dispute Resolution). Respondents shall make all payments required by this Paragraph to EPA by Fedwire Electronic Funds Transfer ("EFT") to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

and shall reference stipulated penalties, Site/Spill ID Number 08-BC(OU3), and the EPA docket number for this action.

At the time of payment, Respondents shall send notice that payment has been made as provided in Paragraph 72.c above.

88. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement Agreement.

89. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

90. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 87. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(I) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(I), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(I) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided in this Section, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 94 (Work Takeover). Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XX. COVENANT NOT TO SUE BY EPA

91. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondents of all obligations under this Settlement Agreement, including, but not limited to, payment of Future Response Costs pursuant to Paragraph 72. This covenant not to sue extends only to Respondents and does not extend to any other person.

XXI. RESERVATIONS OF RIGHTS BY EPA

92. Except as specifically provided in this Settlement Agreement, nothing in this Settlement Agreement shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing in this Settlement Agreement shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

93. The covenant not to sue set forth in Section XX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. liability for failure by Respondents to meet a requirement of this Settlement Agreement;
- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response actions other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site not paid as Future Response Costs under this Settlement Agreement, except as provided in any other settlement agreement between EPA and Grace that has been entered by the United States Bankruptcy Court for the District of Delaware.

94. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVII (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XVI (Payment of Response Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXII. COVENANT NOT TO SUE BY RESPONDENTS

95. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Montana Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Work or Future Response Costs.

96. These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section XXI (Reservations of Rights by EPA), other than in Paragraph 93.a (liability for failure to meet a requirement of the Settlement Agreement) or Paragraph 93.d (criminal liability), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

97. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXIII. OTHER CLAIMS

98. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

99. Nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages, and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

100. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIV. EFFECT OF SETTLEMENT/CONTRIBUTION

101. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. Each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113

of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

102. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work and Future Response Costs. The Parties further agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work and Future Response Costs.

103. Each Respondent shall, with respect to any suit or claim brought by it for matters related to this Settlement Agreement, notify EPA in writing no later than sixty (60) days prior to the initiation of such suit or claim. Each Respondent also shall, with respect to any suit or claim brought against it for matters related to this Settlement Agreement, notify EPA in writing within ten (10) days after service of the complaint or claim upon it. In addition, each Respondent shall notify EPA within ten (10) days after service or receipt of any Motion for Summary Judgment and within ten (10) days after receipt of any order from a court setting a case for trial, for matters related to this Settlement Agreement.

104. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant by EPA set forth in Section XX.

105. Effective upon signature of this Settlement Agreement by a Respondent, such Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from such Respondent the payment(s) required by Section XVI (Payment of Response Costs) and, if any, Section XIX (Stipulated Penalties) shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States related to the "matters addressed" as defined in Paragraph 102 and that, in any action brought by the United States related to the "matters addressed," such Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to

Respondents that it will not make this Settlement Agreement effective, the statute of limitations shall begin to run again commencing ninety days after the date such notice is sent by EPA.

XXV. INDEMNIFICATION

106. Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, contractors, subcontractors, employees, and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Settlement Agreement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

107. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

108. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXVI. INSURANCE

109. At least five (5) days prior to commencing any on-site work under this Settlement Agreement, Respondents shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of one million dollars, combined single limit, naming EPA as an additional insured. Within the same time period, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all

persons performing the Work on behalf of Respondents in furtherance of this Settlement Agreement. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVII. MODIFICATIONS

110. The EPA Project Manager may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the EPA Project Manager's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the Parties.

111. If Respondents seek permission to deviate from any approved work plan or schedule, Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the EPA Project Manager pursuant to Paragraph 110.

112. No informal advice, guidance, suggestion, or comment by the EPA Project Manager or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXVIII. ADDITIONAL REMOVAL ACTION

113. If EPA determines that additional removal actions not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondents of that determination. Unless otherwise stated by EPA, within thirty (30) days after receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondents shall submit for approval by EPA a work plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Settlement Agreement. Upon EPA's approval of the plan pursuant to Section VIII, Respondents shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the EPA Project Manager's authority to make oral modifications to any plan or schedule pursuant to Section XXVIII (Modifications).

XXIX. NOTICE OF COMPLETION OF WORK

114. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including post-removal site controls, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondents. If EPA determines that such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate in order to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Settlement Agreement.

XXX. INTEGRATION/APPENDICES

115. This Settlement Agreement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

Appendix A: Action Memorandum Amendment

Appendix B: Work Plan

Appendix C: EPA Region 8 QA Document Review Crosswalk

Appendix D: Asbestos Laboratory Acceptance Criteria for Libby Asbestos Superfund Site

XXXI. EFFECTIVE DATE

116. This Settlement Agreement shall be effective 3 days after the Settlement Agreement is signed by the Regional Administrator or his/her delegate.

The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Settlement Agreement and to bind the parties they represent to this document.

Agreed this 19 day of September, 2012

For Respondent W.R. Grace & Co. – Conn.


By: Karen E. Ethier
Karen E Ethier
Vice President, Global Environment, Health and Safety

For Respondent Kootenai Development Company

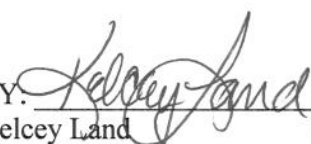
By: Karen E. Ethier
Karen E. Ethier
Vice President

It is so ORDERED and Agreed this 19th day of Sept, 2012.


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

BY: 
Bill Murray
Director, Superfund Remedial Response Program
Office of Ecosystems Protection and Remediation

DATE: 9/19/12

BY: 
Kelcey Land
Director, Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice

DATE: 9/19/12

BY: 
Andrea Madigan
Supervisory Attorney, Legal Enforcement Program
Office of Enforcement, Compliance and Environmental Justice

DATE: 9/19/12

EFFECTIVE DATE: September 24, 2012